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No. 82-290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

—against—

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

—and—

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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October 18, 1982

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

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PRELIMINARY STATEMENT

Appellees, the Finance Administration and the Tax Commission of the City of New York ("City"), move the Court to dismiss the appeal herein on the grounds: (1) that the order of the New York Court of Appeals is not final pursuant to 28 U.S.C § 1257, and (2) that the appeal does not present a substantial federal question. In the alternative, appellees ask that the order of the New York Court of Appeals be affirmed.

THE STATE STATUTE AND THE NATURE OF THE CASE

I. The Statute

Appellant attacks the constitutionality of New York Real Property Tax Law (RPTL) § 720(3), as added by the New York State Legislature on December 3, 1981. L. 1981, ch. 1057, § 7, McKinney's N.Y. Session Laws 1981, March 1982 Supp. at 1981-233. The statute reads as follows:

> 3. Evidence on the issue of whether an assessment is unequal shall be limited as hereinafter provided. The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue. In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be. Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement or tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of such statement or tabulation of values stated by his witnesses. The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to the following:
>
> (a) in all assessing units, actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made;
>
> (b) in all assessing units other than special assessing units as defined in section eighteen hundred one of this

chapter, the state equalization rate established for the roll containing the assessment under review; or

(c) in all special assessing units as defined in section eighteen hundred one of this chapter, only for proceedings commenced with respect to assessment rolls completed after December thirty-first, nineteen hundred eighty-three, the latest applicable class ratio established for the roll containing the assessment under review; provided, however, that such class ratios shall not be admissible pursuant to this paragraph unless the petitioner alleges and proves an inequality greater than twelve and one half percent of such class ratio.

As can be seen, the purpose of RPTL § 720(3) is to regulate the evidence which can be introduced on the issue of the general ratio of assessed value to full value in real property tax review proceedings grounded on a claim of inequality. A brief history of the statute's predecessors is helpful to its understanding.

Since 1880, New York has permitted judicial review of real property tax assessments on grounds of illegality, overvaluation, or inequality. L. 1880, ch. 269. An inequality proceeding involves a two-step process: proof of the average ratio of assessed value to full value in the tax district and proof of the value of the taxpayer's property. The ratio is applied to the value of the property to determine whether the owner's assessment, even though not an overvaluation, nevertheless is at a greater percentage of full value than that generally prevailing in the district.

The traditional means of proving ratio was to compare the assessed values of a sample of other properties in the taxing district with their actual values as established by appraisals. However, it appears that in some cases the amount of proof offered grew to inordinate proportions. Cf. *People ex. rel. Stewart* v. *Feitner*, 53 Misc. 334, 104 N.Y.S. 794 (Sup. Ct., N.Y. Co., 1907). Thus, in 1911 the Legislature amended former

N.Y. Tax Law § 293 (predecessor of RPTL § 720(3)) to permit the court to select the parcels to be utilized in determining ratio if the parties could not agree on a representative sampling. L. 1911, ch. 302, § 1. In 1920 the Legislature again amended the statute to provide that a comparison of sales prices to assessed values could also be used in establishing ratio as an adjunct to the sample parcel approach. L. 1920, ch. 643.

In 1951, a taxpayer attempted to introduce the equalization rate established by the State Board of Equalization and Assessment (SBEA) as evidence of ratio in an inequality review proceeding, but the rate was held to be inadmissible. *People ex. rel. Yaras* v. *Kinnaw*, 303 N.Y. 224, 101 N.E. 2d 474 (1951). The SBEA rate is established annually for each of the taxing jurisdictions in the State pursuant to N.Y. Real Property Tax Law, Art. 12, and purports to measure the average ratio of assessed value to full value in the district. The primary function of the rate is to compute the state constitutional tax and debt limits of the various municipalities in New York and to equalize state aid to localities.

In 1961, RPTL § 720(3) was amended to permit introduction of the SBEA rate but, as with sales, it was only allowed as an adjunct to the sample parcel approach. L. 1961, ch. 942. An attempt to use the rate by itself failed in *Matter of O'Brien* v. *Assessor of the Town of Mamaroneck*, 20 N.Y. 2d 587, 232 N.E. 2d 844, 285 N.Y.S. 2d 843 (1967). By virtue of a 1969 amendment to the statute, the SBEA rate, as well as sales proof, was permitted to be introduced, "whether or not" the sample parcel method was employed. L. 1969, ch. 302; see, e.g., *Guth Realty* v. *Gingold*, 34 N.Y. 2d 440, 315 N.E. 2d 441, 358 N.Y.S. 2d 367 (1974).

In 1979, the Legislature became convinced that use of the SBEA rate in property tax proceedings was producing invalid results. Enacting an amendment to RPTL § 720(3) precluding its use as evidence of ratio the Legislature stated (L. 1979, ch. 126, § 1):

> Section 1. The legislature hereby finds and determines, after carefully evaluating the impact of the provisions of subdivision three of section seven hundred twenty of the real property tax law in relation to permitting the use of the state equalization rate established for the roll in proceedings to review real property assessments, that such provisions are not capable of valid application to assessments of business and commercial properties as well as residential properties in the particular assessing unit. Moreover, in many instances the use of such equalization rate has not proven to be valid even in connection with the same types of property and has often resulted in undesirable and unintended results.
>
> The legislature further finds that the reason such equalization rate is inappropriate and invalid is that the equalization rate established for the roll was never intended to determine property values for taxing purposes but was intended only to be used in connection with equalizing state aid and to compute constitutional tax and debt limits. Therefore, the use of such equalization rate for the purpose of quantifying the ratio of assessment to market value within a taxing district produces spurious and counter-productive results.
>
> In view of the foregoing, . . . the legislature hereby determines that the within provisions of this chapter should be enacted and that for all causes and purposes such provisions shall be deemed and construed as remedial in nature.

This ban on the use of the SBEA rate was continued by L. 1981, ch. 3; L. 1981, ch. 107; and L. 1981, ch. 259, as part of a general review of the State's real property tax system in the wake of the decision in *Hellerstein* v. *Assessor of the Town of Islip*, 37 N.Y. 2d 1, 332 N.E. 2d 279, 371 N.Y.S. 2d 388 (1975). Finally, on December 3, 1981, a comprehensive new tax statute was enacted, in which former RPTL § 720(3) was repealed and current RPTL § 720(3) was enacted. It is this legislation, which

permits use of the SBEA rate except in special assessing units, that appellant here challenges.*

II. Nature of the Case

Appellant commenced property tax review proceedings with respect to two parcels of property it owns in New York City for tax years 1972/73—1979/80. In its petitions, appellant alleged that the assessments on these properties had been fixed at a higher proportionate valuation than the assessment of other properties in New York City.

In June, 1980, Justice Mangan of the New York Supreme Court held in *Colt Industries* v. *Tax Commission* that the 1979 ban on use of the SBEA rate precluded its introduction in tax review proceedings tried after its effective date (App., A20-A31).** Thereafter, appellant moved for an order which, in essence, sought to bar the City from relying on *Colt* when appellant's petitions were to be tried. In appellant's view, the SBEA rate should be conclusive and binding on the issue of ratio (Appellant's Court of Appeals Br. pp. 1, 63). This motion was denied, and this case and *Colt* were appealed and argued together in the Appellate Division of the New York Supreme Court.

The Appellate Division affirmed the orders appealed from, one Justice dissenting (App., A50-A57). That Court then granted both appellant and Colt leave to appeal to the New York Court of Appeals from its orders of affirmance.

The cases were argued in the Court of Appeals on November 18, 1981. The statute as enacted when the case was in the lower courts had expired on October 30, but new RPTL § 720(3) had

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* A special assessing unit is defined by RPTL § 1801(a) as "an assessing unit with a population of one million or more." At present, New York City and Nassau County are the only special assessing units in the State.

** Appendix references are to the Appendix to the Jurisdictional Statement. Page references to the statement itself will be preceded by "J.S.".

been passed by the Legislature shortly before in late October. However, the bill of which this was a part was vetoed by the Governor on November 11, 1981. On December 3, 1981 the Legislature overrode the Governor's veto, and current RPTL § 720(3) became law. The Court of Appeals thereupon agreed to accept supplemental, post-argument briefs addressed to the constitutionality of RPTL § 720(3) as presently constituted. On January 7, 1982, the Court of Appeals issued its unanimous opinion upholding the statute (App., A1-A9).

ARGUMENT

I. The Order Appealed From Is Not Final

The order of the New York Court of Appeals is not a final judgment or decree, as required by 28 U.S.C. § 1257. The Court's order merely ruled on a procedural issue concerning what evidence may be introduced on the issue of ratio pursuant to the state statute governing property tax assessment review proceedings. The entire tax review proceeding remains to be tried, including questions concerning the ratio at which property in the City has been assessed and the values of appellant's properties.

Appellant's claim of finality rests on the assertion that "the federal issue presented herein is conclusive of the outcome of the case" (J.S. 20), citing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). That is not the case. Appellant retains both the sales and sample parcel modes of proof by which it can establish ratio. These methods, the established means of proving ratio for over 50 years, afford appellant a meaningful opportunity to attempt to establish unequal treatment. As the Court of Appeals recognized, the Legislature did "no more than restore, in special assessing units, the *status quo ante* chapter 942 of the Laws of 1961 which first authorized the admission of State equalization rates" (App., A8). Indeed, on analysis it is clear that it went even further, since in 1961 sample parcel proof was mandatory with sales only usable as

an adjunct. Now, however, sales can be used on their own, without resort to the sample parcel proof that appellant finds so objectionable.

The challenge here is clearly limited to the facial validity of RPTL § 720(3). Appellant has never attempted to establish ratio by either of the permissible methods, or to show its absence of financial ability to do so, other than by the submission of a self-serving affidavit (App., A47-A49) that was never subject to challenge given the procedural posture of this case. Thus, it cannot be heard to argue that application of RPTL § 720(3) in this proceeding violates its constitutional rights, an issue that remains to be tested. Moreover, even if that were relevant, it is clear that the mere assertion of added cost in establishing a claim is insufficient to confer the aura of finality on an interlocutory order that is deemed sufficient to create jurisdiction under 28 U.S.C. § 1257. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948).

Additionally, appellant omits reference to RPTL § 716, which permits a taxpayer in New York State to serve a demand on the taxing district that it admit the prevailing level of assessment. If the district fails to do so and the taxpayer successfully establishes a lower ratio, the entire cost of proof on this issue is shifted to the municipality. This is what happened in *860 Executive Towers* v. *Board of Assessors of the County of Nassau*, 53 A.D. 2d 463, 385 N.Y.S. 2d 604 (2d Dept. 1976), aff'd *sub nom., Pierre Pellaton Apartments* v. *Board of Assessors of the County of Nassau*, 43 N.Y. 2d 769, 372 N.E. 2d 801, 401 N.Y.S. 2d 1013 (1977), the case on which appellant heavily relies (see, e.g., J.S. 12-13). Also overlooked by appellant are the many cases in which sales and sample parcel proof have been used in inequality proceedings in New York. See *People ex rel. Hagy* v. *Lewis*, 280 N.Y. 184, 20 N.E.2d 386 (1939); *Matter of Mid-Island Shopping Plaza* v. *Podeyn*, 25 Misc. 2d 972, 204 N.Y.S. 2d 11 (Sup. Ct., Nassau Co., 1960), aff'd 14 A.D. 2d 571, 218 N.Y.S. 2d 249 (2d Dept. 1961), aff'd 10 N.Y. 2d 966, 180 N.E. 2d 63, 224 N.Y.S. 2d 283 (1961); *Matter of Seneca Hotel Corp.* v. *Chacchia*, 13 A.D. 2d

896, 215 N.Y.S.2d 518 (4th Dept. 1961), aff'd 10 N.Y.2d 1031, 180 N.E.2d 435, 225 N.Y.S.2d 48 (1962); *Matter of Rochester Savings Bank* v. *Wagner*, 34 A.D. 2d 164, 310 N.Y.S. 2d 746 (4th Dept. 1970). Also, N.Y.C. Administrative Code § 166-1.0 permits a sectional approach to inequality rather than measuring it on a citywide basis (see *Colt, supra*, App., A2-A3), thereby limiting the quantum of proof, and concomitantly the expense of proof, on the ratio issue. These considerations simply destroy appellant's assertion that financial constraints are such as to render any proof of ratio impossible and thereby preordain the result on remand.

As this Court has repeatedly emphasized, treating interlocutory orders as final for § 1257 purposes is something that should be done only in rare circumstances. Otherwise, the policy considerations underlying the requirement of finality—which include avoidance of unnecessary constitutional adjudications—would be undermined. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J. concurring). In these proceedings, appellant continues to have available the traditional sales and sample parcel methods of proving the generally prevailing ratio of assessed value to full value. The order of the New York Court of Appeals is not conclusive of the outcome of this case, as claimed by appellant, and therefore is not final within the meaning of 28 U.S.C. § 1257.

II. The Question Presented Is Not Substantial

It is settled that where prior decisions of this Court are so clearly dispositive of the issues that no room is left for good faith argument, the federal question is not substantial and this Court has no jurisdiction over the matter. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308 (1902); *Zucht* v. *King*, 260 U.S. 174 (1922); *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952). Here, prior decisions, relied on by the New York Court of Appeals, plainly demonstrate that neither the due process nor equal protection claims of appellant is of any merit, thus removing the order from this Court's jurisdiction.

A. Due Process

The due process clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." Appellant here claims a property right to use of the SBEA equalization rate as evidence of ratio in state tax review proceedings, and contends that RPTL § 720(3), in denying use of the rate, violates due process.

It is beyond question, however, that no person has a property right in any particular form of remedy or rule of evidence. *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933). As the Court said in *Gibbes*, "all that [a person] is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure (citing cases)." *Id.*, at 332. Unquestionably, appellant has not been denied its right to secure judicial review of its property tax assessments by RPTL § 720(3). As noted earlier (*supra*, pp. 7-8), it continues to have available the sales and sample parcel methods of proof by which to establish the general ratio of assessment in the City and against which its assessments can be measured. These traditional means of proof, which have been used by taxpayers in New York State (see cases cited *supra*, pp. 8-9), provide appellant an effective means of redress for what it believes are unequal assessments.

Because the right to judicial review remains unaffected by RPTL § 720(3) and only an evidentiary rule is challenged, no property right of appellant is at issue. Consequently, the due process claim advanced is not substantial.

B. Equal Protection

Appellant also challenges RPTL § 720(3) because it permits use of the SBEA rate as evidence in all but special assessing units. In appellant's view, this causes the statute to violate the equal protection clause.

It is firmly established, however, that states possess wide latitude in fashioning rules of evidence for use in their courts,

and that territorial uniformity is not required by the equal protection clause. *Salsburg* v. *Maryland*, 346 U.S. 545 (1954); *North* v. *Russell*, 427 U.S. 328 (1976). Indeed, the lack of any requirement that all areas of a state be treated alike is not open to question. See *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964). "The Equal Protection Clause relates to equality between persons as such rather than between areas." *Salsburg, supra*, at 551. As this Court stated many years ago in *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879):

> If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws.

RPTL § 720(3) satisfies the requirements of equal protection. It applies equally to all taxpayers in special assessing units, and equally to all taxpayers in other assessing units. Just as appellant has no constitutional right in continuance of the SBEA or its rate, which could be abandoned by the State Legislature in favor of other means of apportioning state aid to localities, appellant had no right to continued availability of the SBEA rate as evidence of ratio in tax proceedings. As the Court of Appeals held (App., A7):

> The Legislature had a rational basis for designating the City of New York and Nassau County special assessing units and restricting the admissibility of State equalization rates in such units. This legislation which was designed to overrule this court's decision in *Matter of Hellerstein v. Assessor of Town of Islip*, 37 N.Y. 2d 1, 371 N.Y.S. 2d 388, 332 N.E. 2d 279, which required full value assessment for all property, recognized the unique nature of those communities with their high density of population and diversity of property.

Accordingly, because prior decisions of this Court make plain that appellant's equal protection claim is wholly without merit, it, too, fails to present a substantial federal question.

CONCLUSION

The City's motion to dismiss this appeal should be granted or, in the alternative, the order of the New York Court of Appeals should be affirmed.

Dated: October 18, 1982

Respectfully submitted,

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